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6 IN THE COURT OF APPEALS  
7 OF THE STATE OF WASHINGTON  
8 DIVISION II

9  
10 IN RE THE PERSONAL RESTRAINT  
11 PETITION OF:

12 ROBERT SHERMAN WILSON,

13 Petitioner,

NO. 45059-3-II

STATE'S SUPPLEMENTAL RESPONSE  
RE: DECLARATION OF PHILLIP  
CHASE

14  
15 A. ISSUES PERTAINING TO THE REQUESTED SUPPLEMENTAL RESPONSE:

16 1. Should this Court dismiss petitioner's personal restraint petition where he  
17 has failed to present competent, admissible evidence and failed to satisfy the five  
18 elements required for relief from newly discovered evidence?  
19

20 B. STATUS OF PETITIONER:

21 Please refer to the State's response to petitioner's personal restraint petition filed on  
22 December 9, 2013, for the complete status of the petitioner.  
23

24 On June 24, 2013, petitioner filed a personal restraint petition seeking relief from  
25 restraint imposed as a result of his convictions for first degree robbery and first degree

1 unlawful possession of a firearm from Pierce County Superior Court Cause No. 09-1-  
2 00181-1. Petitioner alleged that newly discovered evidence, specifically a confession by  
3 another person to the robbery, entitled him to relief. The State filed a response arguing that  
4 petitioner had failed to present any competent evidence to support his claim. Petitioner  
5 filed a reply disputing the failure to present competent evidence. On July 17, 2014, this  
6 Court dismissed the petition because petitioner had failed to meet his burden of presenting  
7 evidence which showed his factual allegations were based on more than mere speculation,  
8 conjecture or inadmissible hearsay.

9  
10 Petitioner then filed a motion for reconsideration with the Washington State  
11 Supreme Court. The Court treated the motion as a motion for discretionary review and  
12 after granting it, remanded the case to the Court of Appeals for reconsideration. This  
13 Court has directed the State file a supplemental response addressing the declaration of  
14 Phillip Chase.

15 C. ARGUMENT<sup>1</sup>:

- 16 1. THE COURT SHOULD DISMISS THE PERSONAL RESTRAINT  
17 PETITION AS WITHOUT MERIT AS PETITIONER FAILS TO  
18 PRESENT COMPETENT ADMISSIBLE EVIDENCE THAT SATISFIES  
19 THE REQUIREMENTS FOR CONSIDERATION OF NEWLY  
20 DISCOVERED EVIDENCE.

21 Personal restraint procedure has its origins in the State's habeas corpus remedy,  
22 guaranteed by article 4, section 4 of the State constitution. Fundamental to the nature of  
23 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A  
24 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for  
25 an appeal. *In re Hagler*, 97 Wn.2d 818 823-24, 650 P.2d 1103 (1982). Collateral relief

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<sup>1</sup> The State will rely upon the facts already detailed in its original response to petitioner's personal restraint petition filed on December 9, 2013.

1 undermines the principles of finality of litigation, degrades the prominence of the trial, and  
2 sometimes costs society the right to punish admitted offenders. These are significant costs,  
3 and they require that collateral relief be limited in state as well as federal courts. *Id.*

4 In order to prevail in a personal restraint petition, a petitioner must meet an  
5 especially high standard. A petitioner asserting a constitutional violation must show actual  
6 and substantial prejudice. *In re Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984). The rule  
7 that constitutional errors must be shown to be harmless beyond a reasonable doubt has no  
8 application in the context of personal restraint petitions. *In re Mercer*, 108 Wn.2d 714,  
9 718-721, 741 P.2d 559 (1987); *In re Hagler*, 97 Wn.2d at 825. A petitioner relying on  
10 non-constitutional arguments, however, must demonstrate a fundamental defect, which  
11 inherently results in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 810-  
12 11, 792 P.2d 506 (1990). Mere assertions are insufficient in a collateral action to  
13 demonstrate actual prejudice. Inferences, if any, must be drawn in favor of the validity of  
14 the judgment and sentence and not against it. *In re Hagler*, 97 Wn.2d at 825-26.

15 Reviewing courts have three options in evaluating personal restraint petitions:

- 16 1. If a petitioner fails to meet the threshold burden of showing actual  
17 prejudice arising from constitutional error or a fundamental defect  
resulting in a miscarriage of justice, the petition must be dismissed;
- 18 2. If a petitioner makes at least a prima facie showing of actual  
19 prejudice, but the merits of the contentions cannot be determined solely on  
20 the record, the court should remand the petition for a full hearing on the  
21 merits or for a reference hearing pursuant to RAP 16.11(a) and RAP  
22 16.12;
- 23 3. If the court is convinced a petitioner has proven actual prejudicial  
24 error, the court should grant the personal restraint petition without  
25 remanding the cause for further hearing.

24 *In re Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

1           Where he claims that newly discovered evidence entitles him to relief, petitioner is  
2 asserting a non-constitutional error.

3                   a.       Petitioner has failed to provide competent admissible  
4                               evidence.

5           The petitioner has the burden to prove claimed error by a preponderance of the  
6 evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). The  
7 petitioner must state in his petition the facts underlying the claim of unlawful restraint and  
8 the evidence available to support the factual allegations. RAP 16.7(a)(2)(i); *In re Pers.*  
9 *Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988)). Conclusive allegations  
10 alone are insufficient. *Id.* When claiming allegations “based on matters outside the  
11 existing record, the petitioner must demonstrate that he has competent admissible evidence  
12 to establish the facts that entitle him to relief.” *In re Pers. Restraint of Rice*, 118 Wn.2d  
13 876, 886, 828 P.2d 1086 (1992).

14           When the “petitioner’s evidence is based on knowledge in the possession of others,  
15 he may not simply state what he thinks those others would say, but must present their  
16 affidavits or other corroborative evidence.” *Rice*, 118 Wn.2d at 886. “The  
17 affidavits....must contain matters to which the affiants may competently testify”. *Id.* The  
18 evidence must show that the factual allegations are based on more than speculation,  
19 conjecture or inadmissible hearsay. *Id.* Hearsay does not constitute “competent,  
20 admissible evidence” that is necessary to justify a reference hearing. *In re Yates*, 177  
21 Wn.2d 1, 27, 296 P.3d 872 (2013). These requirements are mandatory and lack of such  
22 compliance will result in a refusal to reach the merits of the claim. *See Matter of Cook*,  
23 114 Wn.2d 802, 814, 792 P.2d 506 (1990) (citing *Williams*, 111 Wn.2d at 365).

24           Petitioner in the present case fails to meet his threshold burden to show that he has  
25 competent admissible evidence. Petitioner provides a declaration from Phillip Chase in

1 support of his petition for relief. *See* Petitioner's Motion for Reconsideration, Appendix A  
2 (hereinafter "Chase Declaration"). Chase has a significant history of prior criminal  
3 convictions, including several crimes of dishonesty. Appendix A (Stipulation on Prior  
4 Record and Offender Score of Phillip Chase in Pierce County cause number #11-1-03743-  
5 8). The Chase Declaration details two statements Phillip Chase claims were made to him  
6 by two other individuals while he was in custody. The first statement alleges that while he  
7 was in prison, Chase was approached by another inmate named Patrick Lamp who told  
8 him:

9       That his brother<sup>2</sup> ("Wilson") was a good guy, and stated that Wilson had  
10       been convicted and was serving a sentence for robbery that had been  
11       committed by him ("Lamp") and had not disclosed Lamp's identity. He  
12       referred to the Java 2 Go robbery in Graham WA.

13 Chase Declaration at 2. The second statement Chase alleges was made to him occurred  
14 while Chase was in the Pierce County Jail. While there, he states a man known as "Ricki  
15 Walsh" told him that he had seen pictures of the Java 2 Go robbery on Crime Stoppers or a  
16 similar program and he recognized the offender as Patrick Lamp. Chase Declaration at 2.  
17 Walsh told Chase he made the identification from a distinctive leather jacket the offender  
18 was wearing that Walsh had previously owned until Lamp had stolen it from him. Chase  
19 Declaration at 2.

20       Both of these statements are hearsay as Chase is repeating statements that others  
21 have made to him. Neither Lamp nor Walsh have provided affidavits or declarations of  
22 their own making these statements. Petitioner argues that Lamp's statements would be  
23 admissible under the exception to the hearsay rule for statements against penal interest.  
24 *See* Personal Restraint Petition at 8, 12. ER 804(b)(3) provides an exception to the hearsay  
25 rule for statements against interest when the declarant is unavailable as a witness and there

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<sup>2</sup> Chase and Wilson are not brothers, but they are perceived to be through a family connection. Chase Declaration at 1.

1 are corroborating circumstances that clearly indicate the trustworthiness of the statement.  
2 Petitioner has failed to put forth any evidence suggesting Lamp would be unavailable to  
3 testify as a witness. Petitioner has not provided an affidavit or declaration from Lamp  
4 detailing that he would refuse to testify or invoke the privilege against self-incrimination if  
5 asked to testify on the matter. Furthermore, there are no corroborating circumstances  
6 which clearly indicate the trustworthiness of the statement. In contrast, the statement is  
7 being sought to be introduced through Patrick Chase who has significant credibility issues.  
8 Lamp's statement is hearsay and petitioner has failed to show it would be admissible under  
9 an exception to the hearsay rule. Similarly, Walsh's statement to Chase is hearsay and  
10 petitioner fails to even argue it satisfies an exception to the hearsay rule. The Chase  
11 Declaration contains inadmissible hearsay. Petitioner has failed to meet his preliminary  
12 burden to provide competent, admissible evidence necessary to establish relief.

13           b.       Petitioner has failed to establish that Chase's declaration  
14                    constitutes newly discovered evidence

15           Not only is the Chase Declaration not competent or admissible, even if the Court  
16 were to consider the evidence, petitioner fails to establish that it is newly discovered  
17 evidence justifying relief under RAP 16.4(c)(3). RAP 16.4(c)(3) provides:

18           Material facts exist which have not been previously presented and heard,  
19           which in the interest of justice require vacation of the conviction,  
20           sentence, or other order entered in a criminal proceeding or civil  
21           proceeding instituted by the state or local government.

22           The test under RAP 16.4(c)(3) is the same as that applied to motions made for a new trial  
23 based on newly discovered evidence. *In re Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835  
24 (1994); *In re Jeffries*, 114 Wn.2d 485, 493, 789 P.2d 731 (1990). In order to satisfy RAP  
25 16.4(c)(3), the petitioner must prove five elements: 1) the results will probably change if a  
new trial is granted; (2) the evidence was discovered since the trial; (3) the evidence could  
not have been discovered before trial through due diligence; (4) the evidence is material;

1 and (5) the evidence is not merely cumulative or impeaching. *In re Spencer*, 152 Wn.  
2 App. 698, 707, 218 P.3d 924 (2009); *see also State v. Williams*, 96 Wn.2d 215, 223, 634  
3 P.2d 868 (1981). The absence of any one of those factors is grounds to deny a new trial.  
4 *Williams*, 96 Wn.2d at 223.

5       The fact that petitioner has provided a declaration from Patrick Chase does not  
6 change the majority of the State's original arguments with regard to petitioner's ability to  
7 satisfy the five elements required by RAP 16.4(c)(3). The Chase Declaration merely  
8 removes one layer of hearsay from his original petition which contained the same  
9 statements in a hearsay within hearsay format. The State's original response brief first  
10 argued that because the statements were being introduced through Patrick Pitt, they were  
11 not competent, admissible evidence as they were hearsay within hearsay statements that  
12 failed to satisfy any exceptions. State's Response to Personal Restraint Petition at 8-11.  
13 The State then argued that not only was the evidence not competent or admissible, even if  
14 it was relied upon by the Court, petitioner had failed to meet several of the five elements  
15 necessary for relief under RAP 16.4(c)(3). *Id.* at 11-17. Thus, the second portion of the  
16 State's original response analyzing whether the "newly discovered evidence" in the form  
17 of Lamp and Walsh's statements satisfies the elements of RAP 16.4(c)(3) has not changed.  
18 The State requests the Court refer to the analysis in its original response because even if  
19 the Court were to consider the evidence in the Chase Declaration, petitioner still fails to  
20 satisfy the majority of the elements under RAP 16.4(c)(3) for the same reasons outlined in  
21 the State's original response. *See* Response to Personal Restraint Petition at 11-17.  
22 Specifically, the State's original response addressed the fact that the Lamp and Walsh's  
23 statements do not exculpate petitioner, but rather merely implicate Lamp who could have  
24 been acting as an accomplice to petitioner in the commission of the crimes. *Id.* at 15-17.  
25 Petitioner has failed to satisfy the five elements under RAP 16.4(c)(3) to establish the

1 Chase Declaration constitutes newly discovered evidence, and this Court should dismiss  
2 the petition as it is without merit.

3 c. Petitioner's only remedy is a reference hearing.

4 If a petitioner fails to make a prima facie showing of either actual and substantial  
5 prejudice or a fundamental defect, the reviewing court should deny the personal restraint  
6 petition. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17-18, 296 P.3d 872 (2013). If the  
7 petitioner makes such a showing, but there exist material disputed issues of fact, the  
8 superior court should be directed to hold a reference hearing to resolve those factual  
9 questions. *Id*; *In re Rice*, 118 Wn.2d 876, 886-87, 828 P.2d 1086 (1992). Petitioner in the  
10 present case fails to meet a prima facie showing of a fundamental defect which entitles him  
11 to relief. He has failed to show the Chase Declaration contains competent, admissible  
12 evidence and he has failed to meet his requirement to establish the five elements that are  
13 required for relief based on newly discovered evidence. This Court should deny his  
14 petition.

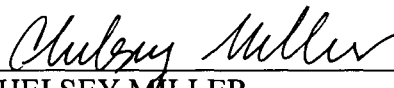
15 However, if this Court were to disagree with the State's arguments and find there  
16 are material disputed questions of fact, petitioner's remedy would be to remand to the  
17 Superior Court for a reference hearing. Any relief petitioner would be entitled to thereafter  
18 would be limited to Count I, robbery and Count II, unlawful possession of a firearm, as  
19 those are the only charges implicated by the alleged statements in the Chase Declaration.  
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1 V. CONCLUSION:

2 The State respectfully requests this Court dismiss petitioner's personal restraint  
3 petition as petitioner has failed to meet his preliminary burden to present competent,  
4 admissible evidence in support of his petition.

5 DATED: September 30, 2015.

6 MARK LINDQUIST  
7 Pierce County  
8 Prosecuting Attorney

9   
10 CHELSEY MILLER  
11 Deputy Prosecuting Attorney  
WSB # 42892

12 Certificate of Service:  
13 The undersigned certifies that on this day she delivered by U.S. mail  
14 or ABC-LMI delivery to the attorney of record for the appellant or  
respondent a true and correct copy of the document to which this certificate  
is attached. This statement is certified to be true and correct under penalty  
of perjury of the laws of the State of Washington. Signed at Tacoma,  
Washington, on the date below.

15 9.30.15 Therese Kar  
Date Signature

## **APPENDIX “A”**



11-1-03743-8 38281188 STPPR 04-04-12



## SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 11-1-03743-8

VS.

PHILLIP CHARLES CHASE,

STIPULATION ON PRIOR RECORD  
AND OFFENDER SCORE  
(Plea of Guilty)

Defendant.

Upon the entry of a plea of guilty in the above cause number, charge ATTEMPTED ASSAULT IN THE SECOND DEGREE, the defendant PHILLIP CHARLES CHASE, hereby stipulates that the following prior convictions are his complete criminal history, are correct and that he is the person named in the convictions:

## WASHINGTON STATE CONVICTIONS

CRIME	SENTENCE DATE	SENTENCING COURT	CRIME DATE	ADULT or JUV.	CRIME TYPE	Felony or Misdemeanor
Possession of Stolen Property 2 <sup>nd</sup> Degree (Note: Motor Vehicle)	7/24/07	Pierce Co., WA #07-1-02672-1	5/16/07	Adult	NV	Felony
Possession of Stolen Property 2 <sup>nd</sup> Degree (Note: Motor Vehicle)	9/13/06	Pierce Co., WA #06-1-03757-1	8/11/06	Adult	NV	Felony
Eluding a Pursuing Police Vehicle	11/15/05	Pierce Co., WA #05-1-04792-7	9/29/05	Adult	NV	Felony
Possession of Stolen Property 2 <sup>nd</sup> Degree	11/15/05	Pierce Co., WA #05-1-04792-7	9/29/05	Adult	NV	Felony
Attempted Assault in the Second Degree (Domestic Violence)	10/15/04	Pierce Co., WA #04-1-04270-6	9/5/04	Adult	Violent	Felony
Assault in the Third Degree (Domestic Violence)	10/15/04	Pierce Co., WA #04-1-04270-6	9/5/04	Adult	NV	Felony
Forgery	11/16/98	Pierce Co., WA #98-8-03263-1	10/11/98	Juven.	NV	Felony
Theft in the Second Degree	7/19/96	Pierce Co., WA #96-8-00416-0	02/09/96	Juven.	NV	Felony

11-1-03743-8

Assault 4 <sup>th</sup> Degree	11/15/05	Pierce Co. District Ct. #1	(2005)	(Adult)	-	Gross Misdemeanor
DWLS 3 <sup>rd</sup> Degree	(2001)	Westport Muni. Ct.	(2001)	(Adult)	-	Misdemeanor
Disorderly Conduct	(2001)	Westport Muni. Ct.	(2001)	(Adult)	-	Misdemeanor
Possession of Marijuana-less than 40 grams	(2000)	Fife Muni. Ct.	(2000)	(Adult)	-	Misdemeanor
Possess/Use Drug Paraphernalia	(2000)	Fife Muni. Ct. (same case as above)	(2000)	(Adult)	-	Misdemeanor

Concurrent conviction scoring: The parties anticipate that the defendant will have pleaded guilty to the following charges in Pierce County #09-1-00030-3 prior to the time of sentencing in this case: Assault 3<sup>rd</sup> Degree, Attempting to Elude a Pursuing Police Vehicle, and Possession of a Stolen Motor Vehicle. The offender score noted herein and SRA "score sheet" submitted in this case are also based upon this assumption.

#### CONVICTIONS FROM OTHER JURISDICTIONS

The defendant also stipulates that the following convictions are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525 (Classifications of felony/misdemeanor, Class, and Type made under Washington Law):

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
<b>NONE KNOWN OR CLAIMED</b>								

Concurrent conviction scoring: (From other jurisdictions - none)

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancement)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	11	IV ["Attempt" standard range is 75% of range for completed offense]	47.25 - 60 months** [**Note - completed offense range is 63 - 84 months. 75% of 84 months equals 63 months. However, this exceeds 60-month statutory maximum.]	N/A	47.25 - 60 months**	5 years


\*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

The defendant further stipulates:

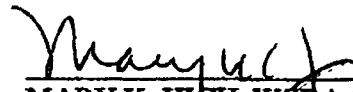
- 1) Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.
- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated.

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 3rd day of April, 2012.

  
 MARK THOMPSON, WSBA #16477  
 Thurston County Senior Deputy  
 Prosecuting Attorney  
 Appointed Special Prosecutor for Pierce County

  
 PHILLIP CHARLES CHASE

  
 MARY K. HIGH, WSBA #20123  
 Counsel for the Defendant

bs

## PIERCE COUNTY PROSECUTOR

**September 30, 2015 - 12:54 PM**

### Transmittal Letter

Document Uploaded: 7-prp2-450593-Response.pdf

Case Name: In Re: The PRP of Wilson

Court of Appeals Case Number: 45059-3

**Is this a Personal Restraint Petition?** ☒ Yes ☐ No

### The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: \_\_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

☒ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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### Comments:

Supp Response

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